

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 15 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ROBERT RICHARDSON,

Petitioner - Appellee,

v.

ANTHONY C. NEWLAND, Warden;
GLENN MUELLER, Warden,

Respondents - Appellants.

No. 04-17255

D.C. No. CV-97-02318-
WBS/DAD

MEMORANDUM^{*}

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, Chief Judge, Presiding

Argued on November 14, 2005
Submission deferred on November 16, 2005
Resubmitted on March 15, 2006
San Francisco, California

Before: GOODWIN, O'SCANNLAIN, and TALLMAN, Circuit Judges.

California state prison wardens Anthony C. Newland and Glenn Mueller
appeal the district court's grant of Robert Howard Richardson's habeas petition.
We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253 and review the

^{*} This disposition is not appropriate for publication and may not be
cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

district court's decision to grant the habeas petition *de novo*. *Leavitt v. Arave*, 383 F.3d 809, 815 (9th Cir. 2004). The facts are known to the parties and will not be repeated here.

The district court erred by determining that Richardson was entitled to statutory tolling for the period his state habeas petition was pending. Richardson's state habeas petition, which the state court dismissed pursuant to California's untimeliness rule, was not "properly filed" for purposes of tolling AEDPA's one-year statute of limitations. 28 U.S.C. § 2244(d)(2); *Pace v. DiGuglielmo*, 125 S.Ct. 1807, 1812 (2005); *Bonner v. Carey*, 425 F.3d 1145, 1149 (9th Cir. 2005). We have rejected the proposition—upon which the district court relied—that statutory tolling is available when the state court denies the postconviction petition both on the merits and as untimely. *Bonner*, 425 F.3d at 1148-49.

Since the district court did not reach Richardson's equitable tolling claim, we remand for further proceedings. *See id.* at 1150.

The Federal Defender's motion to file an amicus brief is denied pursuant to Fed. R. App. Pro. 29. Each party shall bear its own costs on appeal.

REVERSED IN PART AND REMANDED IN PART.